NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS Congressional Information Service, Washington, D.C.

Calendar No. 195

101ST CONGRESS
1st Session

SENATE

REPORT
101–98

REFUSAL OF WILLIAM A BORDERS, JR., TO TESTIFY BEFORE THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

AUGUST 1 (legislative day, JANUARY 3), 1989.—Ordered to be printed

Mr. BINGAMAN, from the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, submitted the following

REPORT

[To accompany S. Res. 162]

The Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings reports an original resolution to direct the Senate Legal Counsel to bring a civil action to enforce the Committee's subpoena to William A. Borders, Jr., and recommends that the resolution be agreed to.

PURPOSE

On July 24 and 27, 1989, William A. Borders, Jr., appeared under subpoena before the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings but refused to answer the Committee's questions. Mr. Borders is a central figure in the Articles of Impeachment. Article I alleges that "[f]rom some time in the first half of 1981 and continuing through October 9, 1981, Judge Hastings and William Borders, then a Washington, D.C. attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in *United States* v. *Romano,* a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants." Articles II–VI and VIII–IX also specifically refer to Mr. Borders. In light of the potential value of his testimony and its determination that he has no valid basis to refuse to testify, the Committee recommends that the Senate direct the Senate Legal Counsel to bring a civil action to require Mr. Bor-

5963-1

ders to testify on facts that are pertinent to the Articles of Impeachment.[1]

DISCUSSION

Section 705(c) of the Ethics in Government of 1978, 2 U.S.C. § 288d(c) (1988), provides that a committee which reports a resolution to authorize a civil action to enforce a subpoena must submit a report that discusses the following subjects:

(A) the procedure followed in issuing such subpoena;

(B) the extent to which the party subpoenaed has complied with such subpoena;

(C) any objections or privileges raised by the subpoenaed party; and

(D) the comparative effectiveness of bringing a civil action under this section, certification of a criminal action for contempt of Congress, and initiating a contempt proceeding before the Senate.

This report discusses each subject in turn.

A. The procedure followed in summoning the witness

After ascertaining on July 18, 1989, that neither the House nor Judge Hastings intended to call Mr. Borders as a witness, Transcript at 1314–26, the Committee voted on July 19, 1989, to issue on its own initiative a subpoena to Mr. Borders to appear before it on July 24, 1989. The Committee publicly announced the subpoena after it was served personally on Mr. Borders by a United States marshal on July 20, 1989.

B. Extent to which the witness complied with the subpoena

Mr. Borders appeared before the Committee on July 24, 1989, accompanied by counsel, and took the oath. After his counsel stated Mr. Borders' objections to testifying, Transcript at 1953–55, the Chairman ascertained from the witness that his refusal to testify was "based, at least in part, on your asserting a privilege against self-incrimination," id. at 1955, communicated to him an immunity order that had been issued by the United States District Court for the District of Columbia on June 27, 1989, pursuant to 18 U.S.C. §§ 6002 and 6005 (1982), and directed him to answer the Committee's questions, id. at 1956. Stating that his counsel had appealed the immunity order and would be filing for a stay of it, Mr. Borders requested "that they be given time to do that," id. at 1959, and "respectfully refuse[d] to answer any and all questions based on the Fifth Amendment, the Sixth Amendment, the Eighth and Fourteenth Amendments." Id.

The Committee retired to deliberate on Mr. Borders' objections. On returning to open session, the Chairman advised the witness that the Committee had determined that he had no right to refuse to answer its questions and directed him to answer them. Id. at

[1] The Impeachment Trial Committee was appointed pursuant to Senate Resolution 38 of the 101st Congress and rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials. Section 3 of Senate Resolution 38 provides that "'[t]he committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders."

1979. Mr. Borders continued to refuse to answer the Committee's questions, including a comprehensive question, as follows:

> The CHAIRMAN. Let me ask one final comprehensive question if I could at this time, Mr. Borders. The committee needs to know whether or not Judge Hastings and you planned together to solicit and accept money from a person who you thought was a defendant in a case before Judge Hastings in return for a modification of the sentence of the defendant and his brother. Among the particular facts that the Senate will need to determine are whether Judge Hastings and you arranged that he would eat at the Fountainebleau Hotel on September 16th of 1981 as a sign that he was a participant in the bribery scheme, and whether or not actions that he took in reducing a forfeiture that had been imposed on the defendants, including the timing of this final order on the forfeiture. were intended to be further signs that he was a participant in the bribery scheme. Additionally, the Senate will need to determine whether on October 5th of 1981 when you and Judge Hastings spoke by telephone and referred to "letters for Hemp," whether you were genuinely discussing help for Hemphill Pride or acting in furtherance of this bribery scheme.
>
> Mr. Borders, are your refusing to testify about each of those matters?
>
> Mr. BORDERS. My answer would be the same to each one, incorporating my statement and answer to each one, sir.

Id. at 1980–81. The Chairman informed Mr. Borders that he should appear again before the Committee on July 27, 1989, and "that in the interim * * * you can use the time to consult with your counsel to pursue the appeal you referred to, take any other legal action you deem appropriate." Id. at 1981.

Mr. Borders returned to the Committee on July 27, 1989, as scheduled. He objected to the Committee's decision to call him after the House and Judge Hastings had declined to do so. Id. at 2805. Acknowledging that he remained under oath and that the immunity order which had been communicated to him remained in effect, he objected that "the immunity does not and cannot force me to testify in deprivation of my [rights under the] First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." Id. at 2806. He concluded by stating, "I respectfully refuse to answer any and all questions * * * and would respectfully request this committee to dismiss me and allow me to reshape and pursue my life." Id. at 2807.

After reviewing the status of Mr. Borders' challenge to the immunity order and noting that it remained unstayed and in effect, the Chairman again directed him to answer the Committee's questions. Id. at 2810.[2] Mr. Borders stood on his statement and refused

---

[2] At the conclusion of Mr. Borders' appearance, the Chairman verified that the witness understood that both the objections he had raised on July 24, 1989, and the additional objections which he stated on July 27, 1989, had been overruled and the witness nonetheless refused to answer all questions. Id. at 2817–18.

to answer all questions. Id. at 2810–11. the Chairman advised him that while the Committee anticipated that the testimony of the parties' witnesses would be completed by August 4, 1989, the Committee's record would remain open to hear his testimony.

C. Objections or privileges raised by the witness

The requirement that a committee seeking civil enforcement of its subpoena report on "any objections or privileges raised by the subpenaed party," 2 U.S.C. § 288d(c), ensures that the Senate "will have all relevant information before it when making its determination. By requiring a committee to note both objections as well as privileges, all arguments made by the subpenaed party with respect to the subpena will be presented for consideration—whether or not legally dispositive." S. Rep. No. 170, 95th Cong., 1st sess. 91 (1977). In this part of our report, we will describe the three principal objections presented by Mr. Borders.

1. The witness's claim that the immunity order is defective

The order entered by the district court on June 27, 1989, and communicated to the witness on July 24, 1989, provided "That William A. Borders, Jr., may not refuse to testify, and provide other information, at proceedings of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, on the basis of his privilege against self-incrimination." In return for his being required to testify, the district court "*Further ordered*, That no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against [Mr. Borders] in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order."

This "proscription of the use in any criminal case" of testimony compelled from the witness "is consonant with Fifth Amendment standards. * * * [It] is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972). The Committee believes that Mr. Borders' challenge to the immunity order is not based on any real concern about the adequacy of the order's protection of his Fifth Amendment privilege.[3] Mr. Borders' claim is that the order should not have been issued because of a defeat in the notification given by the Department of Justice to the Committee that the Department had no interest in delaying the Committee's application. To place Mr. Borders' objection in context, we will review the statutory requirements for the issuance of an immunity order and the actions taken by the Committee, the Department of Justice, and the Court in immunizing Mr. Borders.

The Committee was aware that Mr. Borders had relied in part on the Fifth Amendment when he refused to testify during the House

[3] Although Mr. Borders' counsel, in a letter to the Committee, expressed a concern about state prosecution, that fear is unfounded because the immunity afforded to Mr. Borders protects him against the use of his testimony in "any criminal case," 18 U.S.C. § 6002, whether state or federal. *In re Grand Jury Proceedings, No. 84-4 (Hartmann)*, 757 F.2d 1580, 1582 (5th Cir. 1985) ("State courts are required to respect the immunity granted under [18 U.S.C.] § 6002."); see also *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964).

of Representatives' impeachment inquiry,[4] and that an immunity order would be necessary if the Committee was to hear his testimony. On May 22, 1989, committee counsel advised the Department of Justice's Witness Immunity Unit, which is part of the Criminal Division, of the possibility that the Committee would apply for an immunity order for Mr. Borders' testimony. The Department was prepared, consequently, to respond quickly when, on June 8, 1989, "the Attorney General was served" by the Senate Legal Counsel "with notice of [the Committee's] intention to request the order." 18 U.S.C. § 6005(b) (3). The notification to the Attorney General followed the Committee's vote on June 7, 1989, pursuant to 2 U.S.C. §§ 288b(d) and 288f (1988), to direct the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions Mr. Borders' testimony at proceedings of the Committee. The resolution was approved by nine of the twelve members of the Committee in accordance with the requirement that a request for an immunity order be approved by an affirmative vote of two-thirds of the committee. 18 U.S.C. § 6005(b)(2).

On June 9, 1989, the Department sent to the Senate Legal Counsel a waiver of its right to a limited delay in the filing of the Committee's immunity application, stating that it "has no objection to the proposed order to compel the testimony of William A. Borders, Jr., and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c)." Section 6005(b)(3) provides that the Attorney General should have ten days notice prior to the filing by a congressional committee of an immunity application. As will be described below, the Department of Justice's power to waive the notice requirement was upheld by the District of Columbia Circuit in *In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano),* 655 F.2d 1232, 1236–38 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981). Section 6005(c) authorizes the Attorney General to obtain an additional twenty-day deferral of the issuance of an order after a committee applies for it. The Department's letter was signed by John Mackey for Carol Crawford, the Assistant Attorney General for Legislative Affairs. Mr. Mackey is a Deputy Assistant Attorney General for Legislative Affairs, but the letter did not state his title.

On the basis of the Department's waiver, the Committee applied to the District Court for the District of Columbia, on June 14, 1989—rather than waiting until June 18, 1989, when it could have proceeded without a waiver—for an immunity order for Mr. Borders' testimony. The Committee had been permitting the parties to conduct a limited number of pretrial examinations in June; the slight expedition of the application for the immunity order enabled the Committee to be prepared if the parties sought, or the Committee independently determined to conduct, a pretrial examination of Mr. Borders.

As it turned out, Mr. Borders was not summoned to a pretrial examination. Also, the district court did not act immediately on the immunity application, but set the application down for a hearing on June 26, 1989. Mr. Borders appeared and opposed the issuance

---

[4] Impeachment Inquiry: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 100th Cong., 2d sess. 225 (1988).

of the immunity order. He claimed, even though by then more than ten days had passed since the Attorney General had been notified, that a proper official had not waived the Department's right to ten-days' notice prior to the filing of the immunity application. In response to Mr. Borders' objection, the district court suggested, without holding that it was necessary to do so, that the Committee file a waiver signed by a presidential appointee, which the Committee did on June 27, 1989, when it filed a letter signed by Assistant Attorney General Crawford, which provided Mr. Mackey's title, stated that he had been authorized to sign the correspondence in the Assistant Attorney General's absence, and reiterated the Department's waiver. Upon the filing of that letter, the district court "determin[ed] that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied," and issued the immunity order.

The claim which Mr. Borders is asserting, that the Department of Justice did not use a proper official in waiving the period for its advance notice of the filing of an immunity application, involves a provision that was never intended to benefit a potential witness. Rather, as the United States Court of Appeals for the District of Columbia Circuit has held, the ten-day notice provision "was plainly intended to benefit *solely* the Department of Justice." *Cammisano,* 655 F.2d at 1236 (emphasis in opinion). The purpose of the notification provision is to "provide[ ] the Department of Justice with 'time to "lobby" for a change of mind' on the part of the congressional committee should the Attorney General object to the grant of immunity." Id. (citation omitted). In denying Mr. Borders' motion for a stay pending appeal, the district court emphasized this point when it held that "[i]t is unlikely that Mr. Borders will prevail on the merits of his appeal for, among other reasons, [the notification provision] is designed to protect the Attorney General's interests—not that of the prospective witness." *In re Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (Borders),* Misc. No. 89-129, Memorandum of July 26, 1989 (D.D.C.).[5]

Mr. Borders argues that *United States* v. *Giordano,* 416 U.S. 505 (1974), establishes by analogy a requirement that waiver of the notification period under the immunity statute requires "[t]he mature judgment of a particular, responsible Department of Justice official," just as the Congress has required that the judgment of such an official is "a critical precondition to any judicial order" to intercept wire communications. Id. at 515-16. There is a vast difference, however, between the specific demonstration of high-level judgment that the Congress has required before the Department may apply to the judicial branch for a wire intercept order, and how the Department may communicate to a committee of the Congress that, because the Department has no interest in prosecuting an individual (whom it has already prosecuted), the committee need not

[5] Because the notification provision in the immunity statute is for the sole benefit of the Department of Justice, it is important to note that the Department of Justice's interest in prosecuting Mr. Borders in connection with the alleged conspiracy to bribe Judge Hastings was satisfied by Mr. Borders' conviction in 1982. Following his conviction, the Department itself obtained a use immunity order for Mr. Borders' testimony before a grand jury that reportedly was investigating another bribery matter concerning Judge Hastings. *In Re: Grand Jury Proceedings, Grand Jury 81-1 (Mia.) (William A. Borders, Jr.),* Order of July 26, 1982 (S.D. Fla.).

delay its application to the court for an immunity order. The Assistant Attorney General in charge of the Office of Legislative Affairs has responsibility for "[m]aintaining liaison between the Department and Congress," 28 C.F.R. § 0.27, and is a perfectly appropriate official to communicate to the Congress the determination that no interest of the Department stands in the way of an immediate application by a committee for an immunity order.

Furthermore, the passage of time has robbed Mr. Borders' objection of any legal significance. The committee notified the Attorney General on June 8, 1989 of its intent to apply for an immunity order. Without any waiver or other response from the Department of Justice, the committee could have applied for an immunity order as early as June 18, 1989. Hence, by the time that the district court heard the matter on June 26, 1989, more than ten days had passed since the committee's notification to the Attorney General on June 8, 1989. Between June 8, 1989 and July 24, 1989, the return date on the subpoena to Mr. Borders, forty-six days had elapsed, or more than the total of thirty days by which the Department could have delayed the committee's application for an immunity order if it had exercised all authority that it possessed under the immunity statute to protect its prosecutorial interests. Thus, the district court correctly observed in denying Mr. Borders' stay application that "the Department of Justice has now had more than ten days in which to protect its interest so that any defect in the notice or the waiver is of no material consequence to Mr. Borders." Memorandum of July 26, 1989, at 2.

Mr. Borders filed a notice of appeal on July 6, 1989, from the grant of the immunity order, but took no immediate action to stay the effectiveness of the order. When Mr. Borders appeared before the Committee on July 24, 1989, he asked for time to enable his counsel to apply for a stay. After Mr. Borders' appearance on July 24, the Senate Legal Counsel filed a motion in the court of appeals to dismiss Mr. Borders' appeal, or, in the alternative, for summary affirmance. The Senate Legal Counsel moved to expedite the consideration of that motion. Mr. Borders' counsel moved to delay the consideration of the motion by extending the time to respond to it. The court of appeals denied both the motion to expedite and the motion to delay. In explaining why the Committee would not suffer irreparable injury by the denial of expedition, the court of appeals "note[d] that if [Mr. Borders] refuses to comply with [the] district court's order filed June 27, 1989, [the Committee] may seek enforcement through civil contempt proceedings." *In re Application of Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings*, No. 89-5189, Order of July 26, 1989 (D.C. Cir.).

The filing of an appeal does not vitiate the effectiveness of an immunity order. One reason that the Congress has placed limits on the period during which the Department of Justice may delay the issuance of an immunity order for congressional testimony is to assure that the Congress's access to necessary information is not unduly delayed. It would defeat this central purpose of the immunity statute then to make the process of immunization subject to the uncertainties of appellate calendars. The Committee exercised its discretion in providing Mr. Borders with time to seek a stay, but when he was unable to obtain one the Committee determined that

it should proceed to enforce its subpoena, as the court of appeals has stated unambiguously that the Committee may do.

2. The witness's objections to being summoned after having served a prison sentence on his underlying criminal conviction and having been confined for civil contempt for refusing to testify before a grand jury

Mr. Borders' principal objection to the Committee's subpoena to him is that he served a term of imprisonment and paid a fine imposed on him following his criminal conviction in 1982 for conspiring to bribe Judge Hastings,[6] and that, "[a]bove and beyond that, with regard to the same subject matter which is here under consideration today," Transcript at 1954, he was incarcerated for civil contempt in 1982 for refusing to testify before a grand jury in the Southern District of Florida.[7] He asserts that requiring him to testify would be a denial of due process, violate the constitutional prohibition against double jeopardy, and constitute cruel and unusual punishment. More generally, Mr. Borders stated to the Committee that "I believe my legal debt to society has been paid in full." Transcript at 2805.

Mr. Borders' criminal sentence poses no legal impediment to the Committee's subpoena. Immunity statutes have been enacted for the very reason "that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar* v. *United States,* 406 U.S. 441, 446 (1972).[8] Conviction and imprisonment does not excuse a participant from providing testimony about the culpability of others for "[i]f two persons witness an offense—one being an innocent bystander and the other an accomplice who is thereafter imprisoned for his participation—the latter has no more right to keep silent than the former." *Piemonte* v. *United States,* 367 U.S. 556, 559 n.2 (1961).

Neither does Mr. Borders' incarceration for forty days in 1982 for civil contempt for failing to testify before a grand jury excuse him from testifying in this impeachment proceeding.[9] His incarceration

---

[6] Transcript at 2803. Mr. Borders entered the Allenwood Federal Prison Camp on May 25, 1983, where he was imprisoned until Dec. 10, 1985, when he entered a halfway house, Hope Village. He was released from Hope Village on Feb. 24, 1986, and was on parole until May 27, 1988. Id. at 2802-03. Of his five-year sentence, he was incarcerated for about thirty-three months (including the time in the halfway house) and was on parole for about twenty-seven months.

[7] Transcript at 2804. Mr. Borders was subpoenaed to appear before a grand jury in the Southern District of Florida on June 8, 1982, a month after he had been sentenced in his criminal case, but refused, even after an immunity order was obtained for him that day, to testify. On July 26, 1982, the district court entered an "Order and Judgment of Civil Contempt" under 28 U.S.C. § 1826, and "committed [Mr. Borders] to the custody of the United States Marshal to be confined at a suitable place until such time as he is willing to comply with this Court's order of June 8, 1982, or for the remaining life of the term of Grand Jury 81-1 (MIA.), or for eighteen (18) months, whichever first occurs." *In re: Grand Jury Proceedings, Grand Jury 81-1 (Mia.) (William A. Borders, Jr.)* Order of July 26, 1982 (S.D. Fla.). Mr. Borders remained in custody under this civil contempt order for about forty days.

[8] Indeed, as the Court noted in *Kastigar,* a "notable instance of the early use of immunity legislation is the 1725 impeachment trial of Lord Chancellor Macclesfield. The Lord Chancellor was accused by the House of Commons of the sale of public offices and appointments. In order to compel the testimony of Masters in Chancery who had allegedly purchased their offices from the Lord Chancellor, and who could incriminate themselves by so testifying, Parliament enacted a statute granting immunity to persons then holding office as Masters in Chancery." 406 U.S. at 445 n.13.

[9] In papers filed in the Southern District of Florida in response to the Government's contempt motion, Mr. Borders referred to newspaper articles that he had been summoned to testify about the solicitation of a bribe in another criminal case before Judge Hastings.

in 1982 until "such time as he is willing to comply" with the order that he testify, see note 7 supra, was an exercise of "the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." *Green* v. *United States,* 356 U.S. 165, 197 (1958) (Black, J., dissenting). Even for the same act of contumacy, "civil and criminal sentences serve[] distinct purposes, the one coercive, the other punitive and deterrent." *Yates* v. *United States,* 355 U.S. 66, 74 (1957). Consequently, "that the same act may give rise to these distinct sanctions presents no double jeopardy problem." [10]

Mr. Borders' objection to the Committee's subpoena fails for two other fundamental reasons. The first is that no one is now seeking to punish him. The Committee's subpoena seeks his testimony, not his punishment. Even if a civil enforcement action is authorized by the Senate, the district court will be asked first to issue an order requiring Mr. Borders to comply with the Committee's subpoena. 28 U.S.C. § 1365(b) (Supp. V 1987). The question of civil coercion will arise only if Mr. Borders refuses to obey the court's order. If Mr. Borders believes that the power of the courts to compel his obedience to a judicial order that he testify before the Committee is limited by his civil incarceration in 1982 for failing to testify before a grand jury, he may raise that defense in a civil contempt proceeding in the district court. Mr. Borders' objections based on the double jeopardy and cruel and unusual punishment clauses, as misplaced as the Committee believes they are, apply at most only to the sanctions that may be imposed on him and not to his underlying obligation to testify.

Morever, Mr. Borders' obligation in 1982 to testify before the grand jury and his obligation in 1989 to testify before the Senate or its committee in the pending impeachment are totally separate from each other. Judge Hastings must defend himself against the articles exhibited by the House because double jeopardy is not a bar to them. Many witnesses have been required to testify even though they have testified before the grand jury, at Judge Hastings' or Mr. Borders' criminal trials or both, and before an investigating body in the Judicial Branch. This has been necessary because impeachment serves a distinct constitutional function that is not estopped by prior proceedings in the executive and judicial branches. Whether Mr. Borders testified or not in prior proceedings in other branches, or resisted or yielded to coercion in those proceedings, the Senate has a separate entitlement to his testimony in carrying out its "sole Power to try all Impeachments" under Article I, section 3, clause 6 of the Constitution.

---

[10] Id. The Eighth Amendment's prohibition against cruel and unusual punishment is inapplicable to a judgment of civil contempt that results only in incarceration pending compliance. *Ingraham* v. *Wright,* 430 U.S. 651, 688 (1977); *United States* v. *Dien,* 598 F.2d 743, 745 (2d Cir. 1979).

3. The witness's objection to the committee's decision to call him on its own initiative

Mr. Borders also objects to the Committee's determination to call him as a witness after the House and Judge Hastings decided not to do so. On July 18, 1989, the Committee had heard from the parties on "the issue of whether Mr. Borders should be called as a witness by the committee, or whether either side intends to, and the reasons for that decision." Transcript at 1314 (Chairman Bingaman). The House stated that it would not call Mr. Borders because it believed that its case was sufficient without him, that Mr. Borders would be recalcitrant, and that the House doubted his credibility, but "[w]e will take no position on whether the Senate committee should or should not call him, and we will surely participate in whatever decision it chooses to make." Id. at 1315 (Manager Bryant). Counsel for Judge Hastings advised the Committee that the respondent would not call Mr. Borders. He stated that Mr. Borders had "lied [in 1981] about his ability to affect the fate of Alcee Hastings. We have no intention to give him a second chance to come forward and lie in [a] manner that might affect the fate of Alcee Hastings. We take no position on what the committee should do." Id. at 1321 (Mr. Anderson).

Mr. Borders' objection is best described using his words:

> The committee has decided to call me even though they're allegedly not serving as a prosecutor but, rather, as the chief adjudicatory body. I had always thought that prosecution and judgment are two quite separate functions in the administration of any justice. Consequently, the two should not merge. * * * However, this committee has apparently sought to ignore such a natural course of events in favor and embrace of a marriage between prosecution and judgment.

Transcript at 2805–06.

The Committee agrees with the principle that prosecution and judgment are different functions. Mr. Borders is wrong, however, in describing the decisions to call him as "a marriage between prosecution and judgment." The decision to call Mr. Borders was not intended to favor either the House or Judge Hastings. The Committee has no preconception about whether Mr. Borders' testimony would favor one side or the other. Rather, it has concluded that the effort to find the truth, whoever may be favored by it, would be aided by hearing from the one person other than the respondent who has personal knowledge of it.

An impeachment trial, no less than a trial in a court of law, "is not a game of blind man's bluff; and the trial judge—particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law—need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony." *Johnson* v. *United States,* 333 U.S. 46, 54 (1948) (Frankfurter, J., dissenting in part).[11]

---

[11] Although the Senate is not bound by the Federal Rules of Evidence, the Committee has utilized the rules for guidance. Rule 614 provides that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called."

Moreover, the Senate's task is more than that of resolving a private controversy between the House and Judge Hastings. The Senate has the sole power under the Constitution to remove from office a life-tenured judge, a decision which has implications not only for the judge involved but our constitutional system. In the light of the Senate's unique responsibilities, the Committee concluded that it should not allow the tactical decisions of the parties to foreclose the Senate's opportunity to hear and to evaluate Mr. Borders' testimony.

D. Comparative effectiveness of a civil action or a certification to the United States attorney for criminal prosecution

The Committee has considered the comparative effectiveness of a civil action to enforce the Committee's subpoena compared to an immediate referral to the United States Attorney for a criminal prosecution.[12]

In a civil action under 28 U.S.C. § 1365 (Supp. V 1987), the Committee would apply, upon authorization of the Senate, to the United States District Court for the District of Columbia for an order requiring the witness to answer the Committee's questions. If the district court determines that the witness has no valid reason to refuse to testify, the court would direct the witness to answer the Committee's questions. Disobedience of that order would subject the witness to sanctions to induce compliance. The witness could free himself of the sanctions by testifying. Sanctions could not continue beyond the Senate's need for the witness's testimony; in an impeachment proceeding, the Senate's need for testimony would terminate upon its disposition of the articles of impeachment.

In a criminal referral under 2 U.S.C. §§ 192–194 (1988), the Senate would direct the President pro tempore to certify to the United States Attorney for the District of Columbia the facts concerning the witness's refusal to testify. The United States Attorney would then present the matter to a grand jury, which could indict the witness for contempt of Congress. If convicted, the witness could receive a sentence of up to a year in prison and a $1,000 fine.

The Committee is recommending to the Senate that it proceed at this time with a civil action. The Committee's objective is to obtain Mr. Borders' immediate testimony; the purpose of the civil remedy is to achieve that objective rather than to punish the witness. However, as the Chairman advised Mr. Borders, "the committee's decision to pursue a civil enforcement action at this time does not preclude a later determination to refer the matter to the United States attorney for criminal prosecution for contempt of Congress." Transcript at 2812; see S. Rep. No. 170, 95th Cong., 1st Sess. 95–96 (1977) ("Once a committee investigation has terminated, a criminal contempt of Congress citation under 2 U.S.C. 192, et. seq., might still be referred to the Justice Department if the Congress finds this appropriate. Such prosecution for criminal contempt would present no double jeopardy problem. *In re Chapman*, 166 U.S. 661 (1897); *Yates* v. *United States*, 355 U.S. 36 (1957)").

---

[12] The Senate has not utilized for the past four decades its power to try a recalcitrant witness before the bar of the Senate.

COMMITTEE'S ROLLCALL VOTE

In compliance with paragraph 7 (b) and (c) of rule XXVI of the Standing Rules of the Senate, the record of the rollcall vote of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to report the original resolution favorably was as follows:

YEAS	NAYS
Mr. Bingaman	
Mr. Specter	
Mr. Leahy	
Mr. Pryor	
Mr. Bryan	
Mr. Kerrey	
Mr. Lieberman	
Mr. Durenberger	
Mr. Rudman	
Mr. Bond	
Mr. Gorton	
Mr. Burns	

○